IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case Nos. 03-3009-JWL**
98-20030–01-JWL

DAN ANDERSON,

Defendant/Movant.

MEMORANDUM AND ORDER

On July 2, 2003, the court issued a memorandum and order that summarily denied most of defendant/movant Dan Anderson's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, but ruled that the court would hold an evidentiary hearing regarding the remaining aspect of the motion. *See generally United States v. Anderson*, Nos. 03-3009 & 98-20030-01, 2003 WL 21544241, at *1-*9 (D. Kan. July 2, 2003). The court held an evidentiary hearing on January 5, 2004, and, on March 25, 2004, issued a memorandum and order denying the remaining aspect of the motion. *See generally United States v. Anderson*, Nos. 03-3009 & 98-20030-01, 2004 WL 624966, at *1-*10 (D. Kan. Mar. 25, 2004).

The matter is presently before the court on two motions. First, the government has filed a motion to correct the court's March 25, 2004, memorandum and order (Doc. 840), which the court will construe as a motion to reconsider and will grant as unopposed. Second, Mr. Anderson has filed a motion for a certificate of appealability (Doc. 841) of the court's

denial of his § 2255 motion. Without awaiting a response from the government, the court will deny this motion.

MOTION TO RECONSIDER

In the court's March 25, 2004, memorandum and order, the court discussed the fact that Sarah Grim was with the Missouri Patient Care Review Foundation ("MOPRO") and that MOPRO provided assistance with an investigation at a nursing home (referred to as "NHC Joplin") pursuant to a request from the Office of the Inspector General of the Department of Health and Human Services ("HHS-OIG"). The court stated:

> HHS-OIG was not a part of the investigation or prosecutorial team in this case. Further, neither the FBI nor the prosecutor in this case were involved in the NHC Joplin investigation. There is no evidence that the prosecution team in this case was aware of the details of Ms. Grim's involvement in the NHC Joplin investigation, and therefore the prosecution is not responsible for failing to disclose *much of* this information. *The prosecution did, however, suppress the January 1999 letter from HHS-OIG requesting MOPRO's assistance in conducting the medical review.*

Anderson, 2004 WL 624966, at *9 (emphasis added). The court nevertheless found that the letter was "not *Brady* material because it would not have been favorable to the defense nor material to the verdict because it would not have undercut Ms. Grim's credibility." *Id.* at *10. The government now asks the court to delete the italicized portion of the paragraph above because the government contends that it did not know of the existence of the January 1999 letter until years after trial in 2003 when MOPRO answered Mr. Anderson's interrogatories

associated with his § 2255 motion, and therefore it could not have suppressed the letter at the time of trial.

The information provided in the government's motion is much more informative on this issue than the documents that were presented at the evidentiary hearing. Based on the documents and evidence submitted at the evidentiary hearing, the court's conclusion that the government suppressed this letter is well founded. Counsel for the government discussed the letter with Ms. Grim during her deposition. Further, the discovery requests in Exhibits 35 and 36 were propounded "to plaintiff," *i.e.*, the government, and the response to Interrogatory No. 1 states that MOPRO received the letter from HHS-OIG. Thus, the discovery that was a part of the evidentiary record revealed that the government knew this letter existed and produced it in discovery. The logical inference, then, is that this letter was in the government's possession. While the discovery response to Interrogatory No. 1 was apparently MOPRO's response to the interrogatory, nothing in the record suggests that the prosecution team first learned about the letter during discovery on Mr. Anderson's § 2255 motion. Counsel for the government had an ample opportunity to clarify this issue when counsel discussed the letter with Ms. Grim during her deposition or with Brian Holt during the evidentiary hearing, yet counsel did not present any testimony or evidence from which the court could have inferred that the prosecution team never possessed a copy of this letter until during discovery on Mr. Anderson's § 2255 motion. While the court appreciates the fact that the government did not have the burden of proof or persuasion on this issue, the only evidence in the record suggested that this letter was something the prosecution team had always known about. Further, counsel

stipulated during the evidentiary hearing that counsel for Mr. Anderson would have testified that the government did not produce this document (as well as various other documents) prior to the close of evidence at trial. Thus, the court's conclusion that the government suppressed this letter was imminently reasonable and well supported by the record.

Counsel for the government now represents to the court that the prosecution team first learned about this letter from MOPRO when MOPRO answered the discovery requests. Further, the government has now submitted a copy of a letter that apparently accompanied the government's responses to Mr. Anderson's discovery requests in which counsel for the government explained that counsel was trying to track down a copy of the letter from HHS-OIG. The court appreciates counsel's belated clarification of the fact that the prosecution team apparently did not possess a copy of the letter at the time of trial, but counsel's representation on this matter and the copy of the letter accompanying the government's responses to Mr. Anderson's discovery requests were not a part of the record when the court ruled on Mr. Anderson's § 2255 motion.

Accordingly, the court ordinarily would be inclined to deny the government's motion because the most reasonable inference that can be drawn from the evidence presented on Mr. Anderson's § 2255 motion is that the government had the letter in its possession and did not produce it to Mr. Anderson until discovery in this case—that is, the government suppressed the letter. Nevertheless, Mr. Anderson did not file a response to the motion, and therefore the court will grant the motion as unopposed, *see* D. Kan. Rule 7.4, and will issue a nunc pro tunc

order that amends the above-stated paragraph in the court's March 25, 2004, memorandum and order to delete the italicized language.

MOTION FOR CERTIFICATE OF APPEALABILITY

Mr. Anderson seeks a certificate of appealability ("COA") on the two issues raised in his § 2255 motion: (1) his claim that he was sentenced in violation of the principles set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and (2) his claim that the prosecution failed to disclose impeachment evidence relating to the testimony of Sarah Grim in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the denial of a § 2255 motion is not appealable "[u]nless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). A defendant is entitled to a COA only if he or she can make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). A defendant may satisfy this burden by showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Shipley v. Okla.*, 313 F.3d 1249, 1250-51 (10th Cir. 2003) (applying *Slack*'s debatable-among-reasonable-jurists standard).

Mr. Anderson's motion for a COA on his *Apprendi* claim is denied. It is well established that a term of imprisonment that does not exceed the prescribed statutory maximum, as was the case here, does not implicate the principles of *Apprendi*. *Harris v. United States*, 536 U.S. 545, 565, 569-70 (2002) ("[O]nce the jury finds all those facts

[required for the maximum sentence], *Apprendi* says that the defendant has been convicted of the crime; the Fifth and Sixth Amendments have been observed; and the Government has been authorized to impose any sentence below the maximum."); *see, e.g.*, *United States v. Jardine*, 364 F.3d 1200, 1209 (10th Cir. 2004) (citing *Harris* for this principle); *United States v. Helton*, 349 F.3d 295, 299 (6th Cir. 2003) (same); *United States v. Brown*, 347 F.3d 1095, 1099 (9th Cir. 2003) (same); *United States v. King*, 345 F.3d 149, 151-52 (2d Cir. 2003) (same); *United States v. Ferrara*, 334 F.3d 774, 778 (8th Cir. 2003) (same); *United States v. Veysey*, 334 F.3d 600, 602 (7th Cir. 2003). Although Mr. Anderson contends the Courts of Appeals have misread *Harris*, the court disagrees. This principle is not debatable among reasonable jurists.

Mr. Anderson's motion for a COA on his *Brady* claim is also denied. The principles of *Brady* are well established. The determination of whether Mr. Anderson's constitutional rights were violated under the principles of *Brady* did not turn on a novel, difficult, or complex legal issue or factual analysis. Rather, the court's resolution of this claim turned on the fact-specific inquiry of whether the prosecution suppressed evidence that Mr. Anderson could have used to impeach Ms. Grim's credibility at trial. Although the court allowed certain aspects of this claim to proceed to discovery and an evidentiary hearing, the court did so only to provide an opportunity for the parties to explore and clarify the facts surrounding this claim. Further, although Mr. Anderson alleged that a wide variety of information was undisclosed *Brady* material, the court thoroughly considered and evaluated Mr. Anderson's litany of arguments in this regard and determined that the facts did not reveal a *Brady* violation. Ultimately, the

facts did not reveal even a colorable *Brady* violation. Thus, this claim is likewise not debatable among reasonable jurists. Accordingly, Mr. Anderson's motion for a COA on his *Brady* claim is also denied.

IT IS THEREFORE ORDERED BY THE COURT that the government's motion to correct the court's March 25, 2004, memorandum and order (Doc. 840) is granted.

IT IS FURTHER ORDERED that Mr. Anderson's motion for a certificate of appealability (Doc. 841) is denied.

IT IS SO ORDERED this 28th day of May, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge